No. 85-749 (2)

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IN THE

Supreme Court of the United States

October Term, 1985

MICHELLE MARIE W., a minor by and through her Guardian Ad Litem VERLE W., and DONALD MICHAEL R.,

Appellants,

v.

JUDITH ANNE R. and RONALD BEARLEY W.,

Appellees.

MOTION TO DISMISS OR AFFIRM

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v.

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Appellees.

MOTION TO DISMISS OR AFFIRM

Appellee Ronald W. moves this Court, pursuant to Rule 16.1(b) and (d), to dismiss the instant appeal, or in the alternative, to summarily affirm the judgment of the Supreme Court of the State of California. Appellee contends that any federal questions raised by the California Supreme Court's judgment are so insubstantial as not to warrant further argument, and that this case is not a proper one for argument before this Court.

I

PRELIMINARY STATEMENT

Appellants' Jurisdictional Statement fails to offer a single authority or argument not fully and correctly disposed of by the California Supreme Court in conformity with decisions of California and this Court. Nor does the Jurisdictional Statement, under any interpretation, raise any issue worthy of this Court's attention. To the contrary, appellants' sole point on appeal is that they have a "constitutional right" to ignore the presumption of legitimacy afforded to a child born of a married couple as expressly set forth in California Evidence Code Section 621, so as to unilaterally destroy an existing father-child relationship, rob a child, now eleven years old, of her legitimacy, and further fragment a family already shattered by a divorce in which appellant Donald Riley himself played a material part.

California Evidence Code Section 621 provides that a child born to a married woman who is cohabiting with her husband is conclusively presumed to be the child of the marriage unless established to the contrary within two yers after the child's birth.[1] In two

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[1] Section 621, in its entirety, provides:

(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date

(Footnote 1 continued on page 3)

recent cases, this Court has summarily dismissed constitutional attacks against section 621, and has grounded those dismissals on the lack of a substantial federal question. Precedent thus establishes that there is no substantial federal question upon which this Court should assert probable jurisdiction. This is particularly true where, as here, the California Supreme Court expressly stated that it was *not* interpreting section 621 as an absolute bar to all suits to establish paternity by either the putative father or the presumed legitimate child, and that it was only upholding the constitutionality of that statute as applied to the facts of this case. Furthermore, because this case involves unique and unusual facts, it raises no issues of national consequence and therefore does not merit argument before this Court.

It is undisputed that appellee satisfies all the statutory requirements of section 621, and that he is therefore entitled to its protection. Additionally, from the instant of birth, appellee has acknowledged without exception that Michelle was and is the daughter of his marriage to Michelle's mother, Judith. Appellee continuously has so believed and has supported and nurtured Michelle as his natural and legal daughter, developing with her a close and loving father-child relationship. Today, *eleven years*

(Footnote 1 continued)

> of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.
>
> (e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.
>
> (f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.
>
> (g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.

after the birth of Michelle, appellants ask this Court to help them shatter that relationship.

The judgment of the California Supreme Court in this case was eminently correct. Section 621, on its face and as applied herein, violates no constitutional provision. On the contrary, it furthers significant and compelling State policies by acting as a shield that preserves the integrity of the family unit, fosters child rearing in an harmonious family setting, and protects the welfare of children. These overriding public policies heavily outweigh the interests of appellants herein. The decision of the California Supreme Court merely applies the presumption of section 621 as it was meant to be applied.

This appeal should be dismissed for want of a substantial federal question. Alternatively, the judgment of the California Supreme Court should be affirmed.

II

STATEMENT OF FACTS

The California Supreme Court accurately summarized the facts as follows:[2]

> Defendants Ronald and Judith W. were married on May 7, 1965, and lived together as husband and wife until their separation approximately 12 years later. Judith gave birth to two daughters, Tamara and Michelle, who were raised as the children of that marriage. During the marriage to Judith, Ronald W. provided the necessary support for the

[2] Appellants' Jurisdictional Statement recites the Court of Appeal's abbreviated version of the facts. For this Court's convenience, appellee has reproduced the more complete and accurate statement of the facts contained in the opinion of the California Supreme Court.

children. As the father of Tamara and Michelle, he tended, nurtured and loved them and received affection from them. Through their daily interchanges with Ronald and Judith, Tamara and Michelle were provided with the security, as well as the restraints, they needed for their growth and development.

Donald R., the second claimant to the paternity of Michelle, met Judith in 1973. Donald R. and Judith began having sexual relations in that year, although Judith and Ronald W. were married and living together. On October 24, 1974, Judith gave birth to Michelle. Donald R. did not claim paternity at the time of birth nor thereafter for four years while Judith and Ronald W. remained married and continued to live together. Donald R. asserted no claim nor accepted any responsibility. Throughout that time, without objection from Donald R., the obligation of parenting was fulfilled by Ronald W.

When Ronald and Judith W. separated they executed a marriage settlement agreement; Ronald was granted custody of Tamara, Michelle's sister, and Judith custody of Michelle, by then nearly five years of age. The issue of paternity was not raised. Ronald's obligation to provide child support for Michelle was also not at issue; it was agreed upon.

Following the dissolution of their marriage, Ronald W. regularly and continually exercised his visitation rights with Michelle. In November 1980, when Donald R. married Judith, Ronald W. was refused further visitation. That right was restored when he threatened court action to enforce the settlement agreement. Since Judith's marriage to

> Donald R., Michelle has lived in Donald R.'s home and he has held her out to be his natural child.
>
> In March 1981, this action to establish paternity was brought by Donald R. and Michelle, age six, through her guardian ad litem. Upon the uncontradicted facts that Ronald W. and Judith were living together as a married couple for nine years before Michelle's birth and that Ronald W. was neither impotent nor sterile, the trial court applied the presumption of section 621 and established that Ronald W. is the father of Michelle. Plaintiffs appeal.

39 Cal. 3d at 359.

III

STATEMENT OF THE CASE

The underlying paternity action was commenced in March of 1981 by Donald M. Riley ("Riley")[3] and a guardian ad litem chosen by Riley and his attorney for then six-year old Michelle. Riley sought an order that he, and not Ronald, is Michelle's "natural father." Ronald answered and raised, *inter alia*, the affirmative defenses of equitable estoppel and the presumption created by Evidence Code Section 621. The Superior Court granted summary judgment for Ronald under section 621, since the uncontradicted facts before the Court were that Ronald and Judith were married and cohabiting when Michelle was born, and that Ronald was neither impotent nor sterile.

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[3] To avoid confusion and in conformity with the Jurisdictional Statement, "Riley" has been substituted for "Donald R." throughout the balance of this Motion. The names of the child ("Michelle") and the presumed legal father ("Ronald") have been left abbreviated to protect their privacy and the overall confidentiality of this matter. Ronald requests that this Court similarly abbreviate the parties' names in any order it issues.

The California Court of Appeal for the Fourth Appellate District reversed, holding that as applied to *Michelle*, section 621 violated the equal protection and due process clauses of the United States Constitution.

Inasmuch as the California Court of Appeal's decision was inconsistent with an earlier decision by the California Court of Appeal for the Second Appellate District (*Vincent B. v. Joan R.*, 126 Cal. App. 3d 619 (1981), *appeal dismissed*, 459 U.S. 807 (1982)), the California Supreme Court granted Ronald's Petition for Hearing and set the matter for plenary consideration, thus vacating the decision of the Court of Appeal below.

On August 5, 1985 the California Supreme Court affirmed the summary judgment in favor of Ronald, holding that as applied to appellants, the presumption of section 621 violates neither the due process nor the equal protection clauses of the California or United States Constitutions. The opinion of the California Supreme Court is reported at 39 Cal. 3d 354 (1985).

Appellants appealed to this Court. In response, and within 30 days after receipt of the Jurisdictional Statement, Ronald filed this Motion to Dismiss or Affirm.

IV

ARGUMENT

A. THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

1. Dismissal Would Be Consistent With This Court's Disposition of Two Prior Cases Raising Substantially Identical Constitutional Challenges to Section 621

In two recent cases, this Court has summarily dismissed constitutional attacks against section 621, grounding those dismissals on

the lack of a substantial federal question. *Estate of Cornelious*, 35 Cal. 3d 461 (1984), *appeal dismissed sub nom. Hall v. Taylor*, __ U.S. __, 104 S. Ct. 2337 (1984); *Vincent B. v. Joan R.*, 126 Cal. App. 3d 619 (1981), *appeal dismissed*, 459 U.S. 807 (1982).

Vincent B. presented this Court with a factual scenario strikingly similar to the instant case. In *Vincent B.*, Joan and Frank were married in May of 1961, and cohabited as man and wife during their marriage and until their separation and divorce in 1974. A boy, Z., was born to the marriage on May 11, 1970, and lived with Joan and Frank until their separation. Joan received custody of the child. In May of 1977 appellant Vincent B. filed an action alleging that he, and not Frank, was Z.'s father. The trial court granted summary judgment against Vincent B. on the ground, in part, that under section 621, Z. was conclusively presumed to be the child of Frank and Joan. The court of appeal affirmed, holding that the conclusive presumption did not deny Vincent B. due process or equal protection. Appellant's petition for a hearing by the California Supreme Court was denied. Vincent B. then appealed to this Court, whereupon this Court subsequently dismissed for want of a substantial federal question.

The instant case is nearly identical to *Vincent B.* in several material respects. In both cases, the putative fathers waited more than six years before asserting their purported claims of paternity. In both cases the putative fathers claimed to have maintained long-standing extra-marital affairs with the natural mothers that were allegedly consummated numerous times during the course of the natural mothers' marriages to the children's fathers. And, in both cases, the presumed legal fathers opposed the putative fathers' actions to establish paternity.

As does Riley, Vincent B. attacked section 621, arguing that it unconstitutionally denied him due process and equal protection. Like the California Supreme Court in the instant case, the *Vincent B.* Court easily distinguished *Stanley v. Illinois*, 405 U.S. 645 (1973) and *In re Lisa R.*, 13 Cal. 3d 636, *cert. denied*, 421 U.S.

1014 (1975). Both the Court below and the *Vincent B.* Court found that the putative fathers' interests were neither as great nor entitled to as much constitutional weight as the interests of the putative fathers in *Stanley* and *Lisa R. Vincent B.*, 126 Cal. App. 3d at 625; 39 Cal. 3d at 362, 364. And, like *Vincent B.*, the present case presents no substantial federal question for review by this Court.

Just last year, this Court dismissed another appeal involving the constitutionality of section 621. In *Estate of Cornelious*, 35 Cal. 3d 461 (1984), *appeal dismissed sub nom. Hall v. Taylor*, __ U.S. __, 104 S. Ct. 2337 (1984), Trudy Hall applied to the court for letters of administration, arguing that a parent-child relationship had existed between herself and the decedent, Cornelious, before his death. Trudy's mother had, however, been married to one Fuller at the time of Trudy's birth. The trial court therefore found that the requisite parent-child relationship did not exist since under section 621 Trudy was conclusively presumed to be Fuller's daughter.

The Supreme Court of California affirmed, rejecting Trudy's claim that the application of section 621 denied her due process. Trudy then appealed to this Court, whereupon this Court dismissed for lack of a substantial federal question.[4]

Twice this Court has been presented with constitutional challenges to section 621, and twice this Court has dismissed, finding no substantial federal question. Since the dismissals of both *Vincent B.* and *Cornelious* constitute dispositions on the merits and carry the effect of stare decisis (*Hicks v. Miranda*, 422 U.S. 332, 344 (1975)), appellants' contention that section 621 is

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[4] The results in *Vincent B.* and *Cornelious* should not by any means be interpreted to suggest that the courts of California will uphold the constitutionality of the section 621 presumption as applied in all cases. On the contrary, the California Supreme Court in *Lisa R.* held that section 621 was unconstitutional as applied to the claimant there. Similarly, the California Supreme Court in the instant case expressly "declined to interpret section 621 as an absolute bar to all suits to establish paternity by either the putative father or the presumed legitimate child." 39 Cal. 3d at 365.

unconstitutional on its face plainly does not raise any substantial federal question. And because one of those cases, *Vincent B.*, involved facts strikingly similar to the instant case, appellants' argument that section 621 is unconstitutional as applied to them should likewise be rejected.[5]

2. This Case Does Not Raise A Due Process Issue Worthy Of Consideration by This Court

Appellants argue that section 621 prevents them from establishing their purported biological parent-child relationship in a court of law, thus depriving them of a liberty interest protected by the due process clause. Appellants' position raises no issue worthy of argument before this Court for two fundamental reasons. First, the interests of the State of California in protecting the integrity of the family and the welfare of its children vastly outweigh appellants' interests in attempting to establish paternity. Indeed, the very gravamen of appellants' argument seems to be that they have a constitutional right to ignore the presumption of legitimacy afforded a child born of a married couple as expressly set forth in section 621, so as to unilaterally destroy an existing father-child relationship and simultaneously illegitimatize the child. In finding appellants' interests outweighed by those of the State, the California Supreme Court applied both law and logic in a manner consistent with previous declarations of this Court and the courts of California.

Second, appellants' procedural due process approach misconceives the very nature and purpose of section 621. The presumption created by section 621 is a legal, not a biological one; section 621 does *not* purport to determine biological paternity. Thus, the so-called presumption of section 621 "is really not a

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[5] Even if this Court is inclined to reconsider the constitutionality of section 621, this case would hardly be an appropriate vehicle for such a drastic policy reversal. As will be developed herein, the facts of this case are such that the only equitable treatment possible is a swift and final dismissal of appellants' action.

presumption, but rather a rule of substantive law." *Jackson v. Jackson*, 67 Cal. 2d 245, 247 (1967). "It codifies the principle that when a husband and wife are living together as such, the integrity of the family should not be impugned. 'The husband is deemed responsible for the wife's child if it is conceived while they are cohabiting; he is the *legal* father and the issue of biological paternity is irrelevant.'" *Cornelious*, 35 Cal. 3d at 464 (quoting *Keaton v. Keaton*, 7 Cal. App. 3d 214, 216 (1970) (emphasis in original)).

Viewing section 621 as a rule of substantive law rather than a rule of evidence, the issue is not whether appellants have a right to attempt to prove that Michelle was actually fathered by Riley, but rather whether the State of California can, in the interest of protecting Michelle, Ronald and the sanctity and stability of their father-child relationship, declare Ronald to be the legal father because Michelle was conceived and born while Ronald and his wife were married and cohabiting. There can be little doubt that the State indeed possesses the power and the right to make such a declaration; were it otherwise, an eleven-year old father-child relationship such as that enjoyed by Ronald and Michelle here could be shattered by the purported paternity claim of one who stood silently by while the relationship was formed.

a. Appellants' Right to Establish Paternity is, in Any Event, Dramatically Outweighed by Compelling State Interests

In *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972), this Court explained that "a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process." (Emphasis in original.) Citing *Roth*, the California Supreme Court noted below that this case "must be resolved by weighing the competing private and state interests." 39 Cal. 3d at 360.

Appellants argue that section 621 is not supported by sound public policy considerations and is not tailored to further legitimate state interests. *See*, appellants' Jurisdictional Statement at 15. However, their argument ignores a long line of California cases that have found section 621 to be founded on, and properly tailored to, adequate and compelling policy considerations. Moreover, their suggestion that the California Legislature acted irrationally and without careful deliberation in retaining the presumption ignores actual legislative history. As will be shown, the California Legislature has on several occasions, and as recently as 1981, carefully reconsidered the provisions of section 621, and has tailored the statute to satisfy compelling state interests.

Section 621 promotes important social policies by preserving the integrity of the family, preserving parent and sibling relationships, protecting the welfare of children by avoiding the stigma of illegitimacy and keeping them off welfare roles, and ensuring the stability of titles and inheritance. Consequently, its presumption has been consistently upheld against constitutional attack. *Cornelious*, 35 Cal. 3d at 465.

The public policies that form the foundation underlying section 621 are particularly applicable to the instant case. First and foremost is the State's interest in protecting the child's welfare -- including its emotional, social and psychological well-being.[6] Had

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[6] Although the California Supreme Court noted that the adoption of the Uniform Parentage Act "has rendered [the consideration of illegitimacy] to be without legal effect" (39 Cal. 3d at 362 n.5), proper concern for Michelle's welfare cannot overlook the emotional, social and/or psychological "stigma" associated with "being branded the child of an adulterous relationship." *Vincent B.*, 126 Cal. App. 3d at 626. It is true that the Uniform Parentage Act and society have properly taken steps to try to ameliorate this "stigma" of illegitimacy, but those steps are insufficient to remove completely the "stigma under which illegitimate children suffer." *Caban v. Mohammed*, 441 U.S. 380, 391 (1979). Regardless of the legal efforts of recent years to remove this "stigma" from society, the fact remains that if Riley were to succeed in this action the result would be to illegitimatize Michelle in her own eyes and in the eyes of others.

the California Supreme Court agreed with appellants herein, it would in effect have been furthering the precise harm sought to be avoided by the Legislature. For ten years Ronald has been Michelle's father in every sense of the word. Michelle was born into Ronald's home; Ronald lived with her as her father for her formative first five years, and Ronald has continued to act as her father despite his separation and divorce from Judith. Michelle's identity as the child of Ronald and Judith, as well as her relationship with Ronald, are established. By the same token, Michelle and Tamara have formed similar attachments as sisters. They lived together under the same roof while their parents were married, and they continue to see each other and maintain their relationship as sisters. In short, despite the divorce, they continue to regard themselves as sisters and as children of Ronald and Judith. To allow Riley to sever eleven-year old Michelle's established identity and tear her away from her existing relationships with Ronald and Tamara would be to order and condone precisely that harm which the Legislature sought to avoid in enacting section 621.

The State's interest in protecting and advancing the integrity of the family is also present here. The fact that Judith and Ronald are no longer married is irrelevant to the application of section 621, since family integrity includes a broad spectrum of relationships between husband and wife, father and daughter, mother and son, brother and sister, and so on, which are formed when human beings reside together for a period of time as something called a "family." The State has an interest not only in guarding the "nuclear" family, but also in preserving and protecting the parent-child and sibling relationships, all of which infuse young children with social and emotional strength and stability. The mere fact that one of these relationship dimensions is legally discontinued (*i.e.*, by divorce of the parents) does not mean that the others have likewise been altered or severed. Parents and children, brothers and sisters, can, and very often do, continue to maintain their intense bonds of love and kinship despite an intervening divorce.

Weighed against the foregoing overriding state interests, the interests asserted by the appellants herein are extremely insubstantial. Riley has a purported abstract interest in establishing that he is Michelle's "legal" father. However, none of the advantages of fatherhood have been denied him. Because he already lives in the same house as Michelle, section 621 does not in any way prevent him from building a normal, healthy and loving stepfather-stepchild relationship.

Insofar as Michelle is concerned, it is alleged that she has an interest in determining the identity of her biological father. However, as the Court below noted, Michelle's interest has

> been treated by the other litigants as an appendage to the rights of the putative father. The guardian ad litem for Michelle is a family friend of Donald and Judith R. Michelle is represented by the same attorney as Donald R. and their interests have been continually asserted as being consistent with each other. Our concern is that Michelle is not the real actor behind this "child" paternity suit and that she may be asserting a right which may or may not be in her best interests. [Footnote omitted.] We are not convinced under the circumstances of this case, that Michelle's rights are greater than those afforded to Donald R. . . .
>
> Michelle is not being threatened with termination of her association with Donald R. She is not even being prevented from obtaining information as to who her biological father is. As stated by the United States Supreme Court, the extent to which due process must be afforded an individual "is influenced by the extent to which he may be 'condemned to suffer grevious loss.'" [Citation.] We cannot say that denying Michelle the opportunity

> to present blood test evidence in a court of law violates the guarantee of due process of law.[7]

39 Cal. 3d at 363-4.

By thus balancing the compelling interests of the State of California against the purported abstract interests and questionable motives of Riley and the Guardian, the California Supreme Court rightfully determined that application of the presumption of section 621 in no way deprives appellants of their due process rights.

Appellants' suggestion that the California legislature acted irrationally and without careful deliberation in retaining the presumption of section 621 is also without merit. It ignores the fact that the California Legislature has on several occasions reconsidered the provisions of section 621, and has carefully refined them so as to further the foregoing compelling state interests.

In *Kusior v. Silver*, 54 Cal. 2d 603, 618 (1960), the California Supreme Court concluded that the Legislature's failure in 1953 to enact that part of the Uniform Act on Blood Tests to Determine Paternity, which specifically would have enabled blood test results to overcome the presumption of legitimacy, indicated legislative intent to stand firm on the presumption. Later, when the Legislature debated enacting the Uniform Parentage Act, it was careful to preserve the presumption of section 621, even though the purpose of the Act was to remove the legal effects of illegitimacy. *Vincent B.*, 123 Cal. App. 3d at 623. For example, Cal. Civ. Code § 7004(b), upon which appellants rely, sets up a rebuttable presumption of fatherhood, "*except* as provided in section 621 of the Evidence Code." (Emphasis added.) The Legislature's intent to retain the presumption is further underscored in Cal. Civ. Code § 7006(d), which states that "[*e*]*xcept as to cases coming within the provisions of section 621 of the Evidence Code*, a man

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[7] The California Supreme Court also noted that a conflict may in fact exist between Michelle's interest and that of Riley. *See*, 39 Cal. 3d at 363 n.6.

not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child. . . ." (Emphasis added.)

In 1980 and 1981, the Legislature again retained the presumption of section 621, as superior to any other provision of law, by adopting limited exceptions which allow the mother or the husband to present blood test evidence disputing the husband's presumed paternity, so long as the evidence is brought within two years of the child's birth.[8]

> The probable rationale for this limited exception was described in a law review article: "In the case of a young child the most palpable relation that anyone has to the child is a biological relationship. The child has no peresonality, he can communicate with no one, and no one can be said to have exercised a formative influence on his character. But in the case of an older child the familial relationship between the child and the man purporting to be the child's father is considerably more palpable than the biological relationship of actual paternity. A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved and upon which liability for continued responsibility to the child might be predicated. This social relationship is much more important, to the child at least, than a biological relationship of actual paternity. . . . The adoption of a statute of limitations in lieu of the present tangle of evidentiary rules offers the obvious advantage of greatly simplifying

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[8] The constitutionality of the two-year statute of limitations is not at issue in this appeal. The Court below noted that "*[p]laintiffs do not challenge* and we do not now address any question regarding the adequacy of the two-year statute of limitations. . . ." 39 Cal.3d at 358 n.1 (emphasis added).

> the law and at the same time molding the law to closer conformity with the relevant policies. . . ."

Cornelious, 35 Cal. 3d at 465-466 (quoting *Recent Developments, California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 Stan. L. Rev. 754, 761-65 (1968)).

The foregoing discussion illustrates that section 621 is and was carefully and deliberately designed and narrowly tailored to further the compelling interests of the State of California. Accordingly, no substantial federal question exists to justify argument before this Court.

b. The California Supreme Court's Decision in This Case is Consistent With All Other Authorities

The California Supreme Court's opinion is consistent with other authorities in this area, and hence there is no substantial federal question for this Court to decide. The California Supreme Court's resolution of the due process issue is so eminently correct so as to warrant affirmance without argument before this Court. Its reliance on the major cases in this area; *Stanley v. Illinois*, 405 U.S. 645 (1971); *Quilloin v. Walcott*, 434 U.S. 246, *reh'g denied*, 435 U.S. 918 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Vlandis v. Klein*, 412 U.S. 441 (1973); *Cornelious; Lisa R.* and *Kusior* was proper, as is evident from its opinion.[9]

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[9] Due to the nature of this Motion, it would be contrary to the dictates of Rule 16.3 to engage in a lengthy discussion of each of the authorities relied on below. Should this Court exercise probable jurisdiction, appellee will thoroughly brief these and other pertinent cases before this Court.

3. The Application of Section 621 to Appellants Does Not Deny Them Equal Protection

Appellants argue that section 621 employs a gender-based classification which allegedly accords a purported natural father fewer procedural protections than a married natural mother, and that it therefore violates equal protection guarantees. As will be shown, there is no equal protection issue here at all and, even if there were, appellants would in any case not be entitled to relief since their personal interests are mightily outweighed by the compelling interests of the State of California. Accordingly, no substantial federal question has been presented and appellants have raised no equal protection issue worthy of argument before this Court.

a. Section 621 Does Not Permit *Anyone* to Challenge Paternity More Than Two Years After the Child is Born

Appellants contend that they are denied equal protection by section 621 because others (*i.e.*, the "husband" and "mother of the child") are given the right to challenge the presumption, while the child and alleged natural father are not. This argument conveniently ignores the language of section 621(c) and (d), which permits the challenger to notice a motion for blood tests "not later than two years from the child's date of birth."[10] While it is true that the California Legislature has given certain classes of persons the right to challenge the presumption of paternity, that right is expressly limited in time.[11]

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[10] Again, it is important to note that appellants did not challenge, and therefore the Court below did not address, the constitutionality of the two-year statute of limitations in section 621. 39 Cal. 3d at 358 n.1. That question is therefore not at issue in this appeal.

[11] The Legislature recognized the importance of an early resolution of paternity disputes in presumption cases when it enacted the 1980 and 1981 amendments to section 621. Subdivisions (b) and (c) permit a husband to challenge the

(Footnote 11 continued on page 19)

Appellants could have attempted to challenge the presumption during the limitations period, but they chose not to. Instead, they waited until March of 1981, six and one-half years after Michelle's birth, to assert their claim. Under these circumstances, section 621 does not permit *anyone* -- not Ronald (the husband) and not Judith (the mother) -- to challenge the presumption, and it therefore does *not* grant anyone rights superior to those of the appellants herein.

Equal protection of the law means that similarly situated persons must receive *similar* treatment under the law. *Caban*, 441 U.S. at 391; *Reed v. Reed*, 404 U.S. 71, 76 (1971). Appellants cannot be permitted to stand in a *better* position than Ronald and Judith. Where, as here, *no one* has any right to challenge the presumption of section 621 after two years have passed, neither Riley nor the Guardian has any basis whatsoever for asserting that the doctrine of equal protection somehow grants *them* such a right. Whatever their rights would have been had they brought their action during the limitations period, it is clear that principles of equal protection have no application to the facts of this case.

b. Compelling State Interests Far Outweigh Appellants' Personal Interests

In the final analysis, section 621's classification is *not* gender-based. A simple reading of the statute makes it clear that section 621 does little more than grant two persons -- the two mature individuals comprising a "nuclear" family unit -- the right to rebut its presumption.

(Footnote 11 continued)

presumption through blood tests if, and only if, the notice of motion for those tests is raised within two years of the child's birth. Subdivision (d) extended the same right to the mother, but within the same time limitation. It seems so obvious as to be beyond reasonable dispute that, cognizant of the child's welfare and the family ties that develop quickly, *the Legislature was willing to permit challenges to the presumption only during the child's infancy.*

Once the statute is viewed as not classifying on the basis of gender, any rational basis is sufficient to support the classification drawn therein. The Legislature could reasonably have found that only a mature member of the family unit itself should be permitted to challenge paternity where that family's issue is involved and, furthermore, that special treatment of the "husband" and "mother" is necessary to serve the legitimate public policies discussed above. As this Court stated in an adoption context in *Quilloin*, 434 U.S. at 256, "[w]e think [an unwed father's] interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father."

Yet even if this Court were to find that section 621 does classify on the basis of gender, appellants would in any case be unable to prevail because the interests of the State of California vastly outweigh their purported personal interests under the facts of this case. In its discussion of appellants' equal protection argument, the Court below applied the general rule that "a sovereign may not subject men and women to disparate treatment where there is no substantial relationship between the classification and an important governmental purpose." 39 Cal. 3d at 364 (citing *Reed*, 404 U.S. 71, 76 (1971); *Craig v. Boren*, 429 U.S. 190, 197 (1976), *reh'g denied*, 429 U.S. 1124 (1977)). The California Supreme Court went on to note that this balancing test had been satisfied in favor of the State and that appellants had therefore not been denied equal protection.

The California Supreme Court's analysis is consistent with other authorities in this area. In support of its analysis of *Caban*, it should be added that the statute in *Caban* was so overbroad that it classified "unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children." *Caban*, 411 U.S. at 394. Section 621, however, makes no judgments or assumptions whatsoever about the qualifications of natural fathers. Section 621 simply *does not*

discriminate against natural fathers on any basis whatsoever. Unlike the statute in *Caban*, section 621 *was* carefully tailored to further the State's compelling interest in preserving the integrity of the family and protecting the welfare of its children.

c. The Decision of the Court Below is Not Inconsistent With the Holding of the Colorado Court in *R. McG.*

Appellants argue that in *R. McG. v. J.W.*, 615 P.2d 666 (Colo. 1980) the Colorado Supreme Court found that a "nearly identical" statute denied a natural father equal protection. *See*, Jurisdictional Statement at 14. Appellants' argument is not only incorrect, but it also risks misleading this Court into believing that a conflict exists between the two States with reference to the constitutional rights of putative fathers. As will be shown below, no such conflict exists.

The *R. McG.* Court held as follows:

> We hold that *so long as the UPA grants a natural mother judicial access for a period of years to seek a determination of paternity against the natural father* of a child born during the marriage of the natural mother to another, equal protection of the laws under the United States and Colorado Constitutions mandates that a claiming natural father be granted judicial access and standing to establish his paternity of that child during that same period of time.

615 P.2d at 671 (emphasis added).

By so holding, the *R. McG.* Court invalidated C.R.S. § 19-6-107(1)(b) of the Uniform Parentage Act, which permits a natural mother to seek "a declaration of paternity in the

non-family natural father," but does not grant a claiming natural father the same right.[12] 615 P.2d at 670. This, said the *R. McG.* Court, "exemplifies a gender-based classification predicated on an overbroad generalization that a mother has a legitimate interest in establishing a determination of paternity in a non-spousal father, while such father has no interest in establishing a determination of paternity in himself." 615 P.2d at 671.

The holding of *R. McG.* is clearly inapposite to the instant case, since section 621 makes no such gender-based distinction, and in no way resembles C.R.S. § 19-6-107(1)(b). Section 621 does *not* permit a natural mother to "seek a declaration of paternity in the non-family natural father." Section 621 *only* permits the "mother of the child" to challenge the paternity of her *own husband*. Cal. Evid. Code § 621(b), (d).

Not only does section 621(d) not grant "the mother of the child" any right to commence an action to determine the paternity of a claiming non-family natural father, but it even denies her the ability to challenge *her own husband's* paternity unless "the child's biological father has filed an affidavit with the court acknowledging paternity of the child."

Unlike C.R.S. § 19-6-107(1)(b), section 621 *is* carefully tailored to further the compelling state interests of preserving the integrity of the family and protecting the welfare of its children. Section 621 prevents a stranger to a marriage from disrupting that marriage and traumatizing its children. Indeed, even the mother herself is not given unfettered freedom to question her husband's paternity; she is only permitted to raise a notice of motion for blood tests if she has a *bona fide* challenge supported by an affidavit from the child's actual biological father.

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[12] California's version of the Uniform Parentage Act contains a similar provision in Cal. Civ. Code § 7006(a)(2). However, the Court below upheld Cal. Evid. Code § 621, *not* Cal. Civ. Code § 7006(a)(2). The constitutionality of § 7006(a)(2) is not at issue in this appeal.

The foregoing discussion highlights the fundamental difference that exists between section 621 and the statute in *R. McG.* Yet even if that difference were not present, *R. McG.* would still be readily distinguishable from the instant case. For in *R. McG.*, the Colorado Court was *able* to grant the claiming natural father an appropriate remedy for the denial of his constitutional rights while, in contrast, no appropriate remedy would be available to the appellants herein. Since C.R.S. § 19-6-107(1)(b) contains a five-year statute of limitations which begins to run upon birth of a child, and since the appellant in *R. McG.* commenced his action approximately two years after the child was born, a remedy was available to him. In the instant case, however, appellants failed to bring their action within the two-year statute of limitations specified by section 621, and therefore would in any case not be entitled to a remedy.

It is axiomatic that the proper remedy for a violation of equal protection is to grant the person whose rights have been denied the same rights as other persons are granted under the law. In *this* respect *R. McG.* is on point, but it supports *appellee's* position -- for in *R. McG.*, the Colorado Court held that the putative father was entitled to assert his claim "*during that same period of time*" as granted by the statute to the natural mother. 615 P.2d at 671 (emphasis added). The Colorado Court did *not* hold that the entire statutory scheme was invalid and that appellant could proceed at any time; rather, its holding was in accord with well-established United States Supreme Court precedent in that it granted the appellant the same rights given to others under the statutory scheme. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973) (servicewomen granted the same rights given to servicemen under a statute allowing career male servicemen to claim their spouses as dependents for increased quarters allowances and benefits); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (unacknowledged illegitimate children given the same priority as legitimate children with respect to claims under a workmen's compensation statute).

Therefore, even if this Court were to find that section 621 violates the United States Constitution as applied to appellants, the proper result under the foregoing precedent would be to grant appellants the same rights and opportunities accorded other persons under section 621. Of course, were such a remedy granted, the two-year statute of limitations contained in section 621 (which has not been challenged by appellants) would bar appellants from rebutting the presumption of paternity.

B. THIS CASE IS NOT A PROPER ONE FOR ARGUMENT BEFORE THIS COURT

Rule 16.1(d) states that "[t]he Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument." The following observations are offered pursuant to Rule 16.1(d) as additional reasons why this case is not a proper one for the Court to hear.

1. Riley's Action is Barred by Equitable Estoppel

It is undisputed that Riley stood silently by and waited six and one-half years before filing this action. He permitted Michelle to live and grow as Ronald's daughter from the moment of her birth, through the dissolution proceeding and thereafter, and did not once acknowledge his paternity. While Riley slept on his rights, he knowingly allowed Ronald to nurture and support Michelle, so that Ronald entertained not the slightest shadow of a doubt that Michelle was his own child.

Ronald raised this issue as his Third Affirmative Defense to Riley's Complaint to Establish Paternity of a Minor Child. He argued that this "action was not filed within a reasonable time after obtaining knowledge of relevant facts and therefore plaintiffs

are estopped to challenge the paternity of defendant" (Answer at 3).

While normally applied in the commercial area, equitable estoppel has been held to be applicable in the context of the child-putative father relationship. *In re Marriage of Valle*, 53 Cal. App. 3d 837, 841 (1975); *Clevenger v. Clevenger*, 189 Cal. App. 2d 658, 673 (1961).

In this context, the facts of the instant case stand out in sharp contrast to the factual scenario in *Lisa R.* In *Lisa R.*, the putative father consistently attempted to assert his rights as father of the child. 13 Cal. 3d at 649. He acknowledged the child upon its birth and, in addition, when he discovered that the child had been declared a dependent ward of the court, he promptly initiated proceedings to terminate her dependency status. In comparison, appellant Riley waited *six and one-half years* to assert his alleged rights. Whatever Riley's constitutional rights would have been had he asserted them during Michelle's infancy, equity demands that he be estopped from raising them to Ronald's detriment at this late date. For this reason, Riley's claim does not merit review by this Court.

2. The Facts of This Case Do Not Raise Issues of National Consequence

Like the facts in *Vincent B.*, the facts of this case are unique and do not present issues of national consequence worthy of argument before this Court. As stated by the Court below, "[i]n our due process analysis we have declined to interpret section 621 as an absolute bar to all suits to establish paternity by either the putative father or the presumed legitimate child." 39 Cal. 3d at 365. The California Supreme Court's decision thus has neither state-wide nor national impact, since it involves no new statements of constitutional law, but merely applies well-accepted principles to unique facts. As such, it simply does not create the general interest

or national consequence necessary to justify argument before this Court.

3. The Potential Harm to Ronald Outweighs Appellants' Interests

The preceding discussion establishes that appellants have not presented any *constitutional* argument worthy of briefing before this Court. Appellee now respectfully requests that the Court consider the *equities* involved in this appeal.

Hidden behind the citations and legalisms of this Motion are a broken heart and a shattered personal life.

Ronald has suffered greatly for nigh unto a decade. Ronald's marriage was violated by the extra-marital affair between Judith and Riley, and that marriage was then torn asunder by divorce. Because of the termination of his marriage, Ronald no longer has the joy of daily association with both of his daughters. In addition, Ronald's visitation rights have been interfered with.

Moreover, Ronald has been forced to defend this action; an action which, for nearly five years, has taken an incredible toll on his peace of mind and emotional well-being. For although Ronald has struggled to keep alive the love that flows between himself and Michelle, he has had to endure the heartbreak of watching his daughter being pulled further and further from his arms and from his life. And, always, the spectre of stolen paternity has loomed, ever present, ever painful.

Ronald does not request that this Court pass moral judgment on Riley's past conduct. Nor would Ronald ever suggest that this Court render a decision not properly founded on constitutional principles. Ronald merely prays that when this Court balances

the competing interests involved in this appeal, it remain cognizant of his interests, his rights, and, most important, the very terrible impact that continuing litigation would have upon his established relationship with Michelle.

V

CONCLUSION

For the reasons stated herein, appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered by the California Supreme Court.

Respectfully submitted,

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